No. 85-633

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

AMREP CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Trade Commission's order in this case exceeded the Commission's remedial authority.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Atlantic Refining Co. v. *FTC*, 381 U.S. 357	9, 11
Barrett Carpet Mills v. *CPSC*, 635 F.2d 299	13
Congoleum Industries, Inc. v. *CPSC*, 602 F.2d 220	13
FTC v. *Colgate Palmolive Co.*, 380 U.S. 374	9
FTC v. *H.N. Singer, Inc.*, 668 F.2d 1107	12
FTC v. *National Lead Co.*, 352 U.S. 419	9, 11
Grolier Inc. v. *FTC*, 699 F.2d 983, cert. denied, 464 U.S. 891	13
Heater v. *FTC*, 503 F.2d 321	10, 11, 13, 14
Horizon Corp., 97 F.T.C. 464	6
L.G. Balfour Co. v. *FTC*, 442 F.2d 1	9
National Licorice Co. v. *NLRB*, 309 U.S. 350	9
Jacob Siegal Co. v. *FTC*, 327 U.S. 608	9
United States v. *AMREP Corp.*, 560 F.2d 539, cert. denied, 434 U.S. 1015	4
Warner-Lambert Co. v. *FTC*, 562 F.2d 749, cert. denied, 435 U.S. 950	12, 13

Statutes:

Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*:	
§ 5, 15 U.S.C. 45	4, 5, 9, 12, 13, 14
§ 5(g), 15 U.S.C. 45(g)	7
§ 19, 15 U.S.C. 57b	7, 11-12, 14
§ 19(e), 15 U.S.C. 57b(e)	12
Flammable Fabrics Act, 15 U.S.C. 1194	13

Statutes—Continued: Page

Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1701 *et seq.* 4
15 U.S.C. 1703(d) 10

Miscellaneous:
S. Conf. Rep. 93-1408, 93d Cong., 2d Sess. (1974) .. 12

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 768 F.2d 1171. The opinion and order of the Federal Trade Commission (Pet. App. 17a-142a) are reported at 102 F.T.C. 1615. The decision of the administrative law judge is reported at 102 F.T.C. 1373.

JURISDICTION

The judgment of the court of appeals (Pet. App. 143a) was entered on July 25, 1985. The petition for a writ of certiorari was filed on October 15, 1985.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This Federal Trade Commission enforcement action concerns the techniques used by petitioner to sell undeveloped land to consumers for investment purposes during the years 1961 to 1975. The evidence adduced in the hearings before the administrative law judge (ALJ), as summarized by the Commission (Pet. App. 49a-117a) and the court of appeals (*id.* at 3a-6a, 13a-14a), showed the following. Petitioner marketed its land at carefully orchestrated dinner parties held far from the location of the undeveloped lots being sold to consumers. These parties included a "staged sales presentation of films, slides, testimonials and enthusiastic speeches [which] generated such excitement that many consumers would sign contracts to buy lots at [petitioner's] subdivisions, sight unseen, before the night was over" (*id.* at 49a).

Moreover, petitioner's salesmen used pressure techniques to obtain sales. Thus, "[t]he salesmen were told to create artificial excitement by calling out 'holds' on particular pieces of property" to create the impression of urgency (Pet. App. 4a). The salesmen also told prospective buyers that petitioner planned to increase prices, and "fill[ed] out * * * form contracts [prepared by petitioner] * * * before prospective buyers had indicated their willingness to buy land." *Ibid.*; *id.* at 103a, 104a-105a. Finally, buyers were told that signing the contract "was only a 'reservation' of a particular piece of land" because they had a right to cancel the contract within 72 hours or within six months on the basis of an inspection of the property (*id.* at 106a-107a), but petitioner used

a variety of techniques to ensure that these options were not exercised (*id.* at 97a-99a, 107a).[1]

The theme of the sales presentation "was that the purchase of a lot at one of [petitioner's] subdivisions was an excellent, low-risk investment." Pet. App. 50a; see also *id.* at 50a-51a, 52a-61a, 84a-87a, 90a-91a. The "great majority of buyers" did purchase the land "for investment purposes" (*id.* at 52a). However, the evidence showed that the lots sold by petitioner "were poor investments and represented substantial financial risks to the purchasers" (*id.* at 42a). The selling price of the property exceeded its fair market value, and there was no resale market for the property (*id.* at 61a-80a, 87a-90a, 91a-92a).[2]

Petitioner's standard form contract provided for a down payment of 10%, with the purchaser paying the balance in monthly installments over five to eight years. In addition, "[u]ntil all payments were made, [petitioner] retained title, use and possession of the lot." Pet. App. 109a. The contracts contained a forfeiture clause providing that "upon default of the buyer, [petitioner would] recover[] all rights to the land and, in addition, retain[] all pay-

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[1] The Commission found that "the visitation privilege * * * was * * * unlikely to overcome the main message of [petitioner's] representation: that substantial local demand was just around the corner," because visiting buyers could not evaluate the property's development potential (Pet. App. 98a).

[2] The Commission stated that insufficient evidence was adduced with respect to one of petitioner's four projects to make a finding as to whether petitioner engaged in a deceptive practice by marketing the property in that project as an "excellent" investment. The Commission noted that petitioner did make false statements concerning the demographic pressure weighing in favor of development in the area surrounding the property. Pet. App. 93a.

ments made by the buyer (including taxes, interest, and assessments) as 'liquidated damages'" (*id.* at 115a).[3]

2. In 1975, the Federal Trade Commission issued an administrative complaint against petitioner, alleging that petitioner's marketing techniques constituted unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission (FTC) Act, 15 U.S.C. 45. Specifically, the Commission alleged that petitioner had falsely represented that the undeveloped property was a safe investment that would result in short term profits, and had made false representations concerning both the growth rates of the areas in which the properties were located and the value of the land. It also alleged that petitioner used unfair high-pressure sales tactics and form contracts containing unfair and illegal provisions. Pet. App. 2a-3a, 40a.

After compiling a hearing record consisting of approximately 25,000 pages and 1,500 exhibits, the administrative law judge held that petitioner had engaged in unfair and deceptive acts and practices.[4] He found that petitioner's "misrepresentations con-

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[3] A typical forfeiture clause is quoted at Pet. App. 115a n.74.

[4] Hearings before the ALJ were stayed shortly after they began pending the completion of a criminal trial of petitioner and its principal officers on charges of mail fraud and violations of the Interstate Land Sales Full Disclosure Act (ILSFDA), 15 U.S.C. 1701 *et seq.*, arising out of petitioner's property sales. Petitioner and its officers were convicted on 20 counts of mail fraud and five counts of ILSFDA violations, and the convictions were affirmed by the Second Circuit. *United States* v. *AMREP Corp.*, 560 F.2d 539 (1977), cert. denied, 434 U.S. 1015 (1978).

cerning the growth, development, and investment potential of its properties" and petitioner's "high pressure sales techniques" constituted unfair and deceptive acts and practices violative of Section 5. Pet. App. 40a-41a. In addition, the ALJ held that several provisions of petitioner's contracts, including the forfeiture clause, constituted unfair practices (*id.* at 41a).

The Commission unanimously concluded that petitioner had engaged in unfair and deceptive conduct (Pet. App. 38a-142a). It held that petitioner's "misrepresentations and failures to disclose material facts [regarding the property's investment potential] are deceptive acts and practices in violation of Section 5 of the FTC Act." Pet. App. 80a; see also *id.* at 80a-84a.[5]

The Commission also held that petitioner's "high-pressure marketing techniques" violated Section 5. It observed that "some of [petitioner's] express claims were simply false," and therefore deceptive (Pet. App. 107a); other techniques were deceptive because they "reasonably could lead consumers to believe that they were required to purchase [petitioner's] land immediately in order to ensure an opportunity to purchase, contrary to fact" (*id.* at 107a-108a); and that still other tactics "facilitated [petitioner's] efforts to mislead consumers and accordingly are in themselves deceptive practices which violate Section 5" (*id.* at 108a).

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[5] The Commission rejected petitioner's claims that the deception was dispelled by disclosure documents provided to purchasers (Pet. App. 95a-97a); that petitioner's representations were statements of opinion for which it was not liable (*id.* at 99a-103a); and that the purchasers' right to exchange one lot for another eliminated any injury due to the deception (*id.* at 93a-95a).

Finally, the Commission held that the inclusion and enforcement of the forfeiture clause in petitioner's contracts constituted an unfair practice. It found that "[t]he high pressure sales campaign, combined with serious misrepresentations about the nature and the value of the investment being offered, negate the presumption that such a harsh provision as the 100% forfeiture clause was the product of free bargaining" (Pet. App. 117a). It further found that actual damages incurred by petitioner upon a buyer's breach of contract typically totaled no more than 40% of the stated contract price (*ibid.*). Thus, the forfeiture clause enabled petitioner "to retain sums greatly in excess of any actual damages," caused documented and substantial consumer injury, and provided no countervailing benefits to consumers (*ibid.*). Relying on its decision in *Horizon Corp.*, 97 F.T.C. 464, 851 (1981), the Commission held that the provision was unfair under Section 5.[6]

The Commission concluded that petitioner had "engaged in a sustained campaign of deception and unfair practices" (Pet. App. 124a, 140a), and that an order was necessary "to stop [the] ongoing deceptive and unfair practices" and prevent such practices with respect to petitioner's future land sale activities (*id.* at 124a). The order imposes several restrictions upon petitioner's future land sale activities, including requirements that petitioner substantiate fu-

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[6] The Commission rejected petitioner's claims that the Interstate Land Sales Full Disclosure Act eliminated or at least limited the Commission's jurisdiction over unfair land sales practices (Pet. App. 44a-47a); petitioner's claim that it was immune under the state action defense (*id.* at 48a-49a); and petitioner's procedural challenges to the ALJ's decision (*id.* at 118a-122a).

ture investment value claims, provide buyers with certain pre-sale information, and include in its contracts specified rights for buyers (*id.* at 124a, 126a-136a).

The Commission's order also prohibits petitioner from enforcing in the future the illegal 100% forfeiture clause in existing contracts and bars it from invoking the clause to collect payments from past buyers in default (Pet. App. 31a, 137a).[7] In addition, the order directs petitioner to send a disclosure letter to past buyers to advise them of the Commission's findings and their legal rights so as "to prevent further injury from [petitioner's] deception" (*id.* at 139a; see also *id.* at 33a, 35a-36a).[8]

3. The court of appeals unanimously upheld the Commission's decision (Pet. App. 1a-16a). The court agreed that petitioner "had engaged in a systematic pattern of unfair and deceptive conduct" (*id.* at 14a). It rejected petitioner's arguments that the Commission's remedial order was overbroad, observing that "[t]he Commission has broad discretionary

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[7] The order permits petitioner to include in future contracts a forfeiture provision complying with requirements of the Interstate Land Sales Full Disclosure Act, which limits the amount of liquidated damages a land seller may collect to the greater of the seller's actual damages or 15% of the cash sales price. See Pet. App. 27a, 117a n.75.

[8] The Commission calculated that the "total consumer injury caused by [petitioner's] deceptive representations" with respect to sales at one project amounted to more than $200 million (Pet. App. 82a). When its order becomes final upon the completion of all judicial review (15 U.S.C. 45(g)), the Commission may initiate a civil action against petitioner under Section 19 of the FTC Act, 15 U.S.C. 57b, seeking restitution or other forms of redress for the injuries suffered by consumers (Pet. App. 124a).

authority to remedy unfair trade practices" (*ibid.*). First, the court held that the Commission's prohibition upon the enforcement of the forfeiture clause was permissible because the prohibition did not reform the contracts, but "merely prevent[ed] [petitioner] from continuing to profit from its inclusion of an illegal forfeiture clause in its past contracts" (*id.* at 15a). Second, the court held that the Commission's requirement that petitioner send notices to past purchasers was permissible because it was "reasonably related to [petitioner's] past violations and practices" and within the Commission's authority to order affirmative disclosures to remedy deceptive practices (*id.* at 15a-16a).[9]

ARGUMENT

Petitioner does not challenge the court of appeals' conclusion that it "engaged in a systematic pattern of unfair and deceptive conduct" (Pet. App. 14a); it objects only to two provisions of the order issued by the Commission to remedy these violations. The decision of the court of appeals upholding the Commission's exercise of its broad remedial authority is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

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[9] The court of appeals also rejected petitioner's claims that the Interstate Land Sales Full Disclosure Act impliedly repealed the Commission's authority over unfair practices in connection with land sales (Pet. App. 6a-8a); petitioner's procedural challenges to the Commission's decision (*id.* at 8a-13a); and petitioner's argument that the Commission's remedial order should not apply to its sales to the public of property with utility services (*id.* at 16a).

This Court repeatedly has recognized that "the Commission is clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist." *FTC* v. *National Lead Co.*, 352 U.S. 419, 428 (1957); see also *FTC* v. *Colgate Palmolive Co.*, 380 U.S. 374, 392 (1965); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 612-613 (1946). Accordingly, " 'the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.' " *National Lead Co.*, 352 U.S. at 428, quoting *Jacob Siegel Co.*, 327 U.S. at 613. The order issued by the Commission here plainly satisfies this standard.

1. Petitioner first challenges (Pet. 3-9) the portion of the order directing it to forbear from enforcing or threatening to enforce the forfeiture clause contained in the land sales contracts. First, it is clear that this provision of the order falls within the Commission's broad remedial authority. The Commission found (and petitioner does not here contest) that the forfeiture clause was an unfair practice violative of Section 5 of the FTC Act; its order barring petitioner from enforcing that clause therefore is directly related to the statutory violation. Indeed, this Court has upheld an order barring the future enforcement of contracts found to violate Section 5. *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 372, 375-377 (1965); see also *L.G. Balfour Co.* v. *FTC*, 442 F.2d 1, 23 (7th Cir. 1971); cf. *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 356-366 (1980).[10]

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[10] Petitioner states (Pet. 4) that the forfeiture clause in its contracts "is and has been widely used and is enforceable under the laws of almost every state." Petitioner ignores the fact that the Interstate Land Sales Full Disclosure Act limits

Second, petitioner's assertion (Pet. 3-4) that the decision below upholding this provision of the order conflicts with *Heater* v. *FTC*, 503 F.2d 321 (9th Cir. 1974), is incorrect. The order at issue in *Heater* "in effect command[ed] [the respondent before the Commission] to make restitution of the moneys secured by [the unfair deceptive practices]" (*id.* at 321 (footnote omitted)). Here, the Commission's order does not require petitioner to refund any money to defrauded purchasers; it simply bars the future enforcement of the unlawful forfeiture clause.

Petitioner argues that the principle applied in *Heater* bars the Commission from issuing any order that has a "retroactive impact" (Pet. 8), but the court of appeals there held that the order exceeded the Commission's authority because it constituted "private relief for *harm caused by acts which occurred before the Commission had declared a statutory violation*" (503 F.2d at 323 (emphasis added)). Thus, the court below correctly interpreted *Heater* as "stand[ing] only for the proposition that the Commission cannot order retroactive private relief (*e.g.*, restitutionary relief or rescission of a contract) in a cease and desist order. It does not impede the Commission from forbidding the enforcement of illegal contracts" (Pet. App. 15a). Here, "[u]ntil [petitioner] enforces [the forfeiture] clause, upon default by the consumer, or forces payment by threatening that it will enforce that clause, there is no harm" (*id.* at 138a). Since the order thus relates to harm

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such forfeiture provisions to the greater of 15% of the purchase price or the seller's actual damages (15 U.S.C. 1703(d)), and that 100% forfeiture clauses of the type included in petitioner's contracts are disfavored under the laws of several states (see *Horizon Corp.*, 97 F.T.C. 464, 851 & n.73 (1981)).

that would be caused to consumers by the *future* enforcement of the forfeiture provision, not harm caused by past conduct, it would not be barred under *Heater*.[11] Indeed, any interpretation of *Heater* that prohibited an order simply because the order affected pre-existing contracts would conflict with this Court's decision in *Atlantic Refining Co.* upholding an order that invalidated pre-existing contracts. There is no indication that the Ninth Circuit intended to adopt such a broad rule in *Heater*.[12]

Finally, there is no merit to petitioner's argument (Pet. 6-7) that Section 19 of the FTC Act, 15 U.S.C.

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[11] The fact that the order imposes costs relating to a contract entered into prior to the issuance of the order does not render the order invalid under *Heater*. The *Heater* court itself recognized that a remedial order is not invalid simply because it imposes economic costs for conduct occurring before the issuance of the order declaring the conduct illegal (503 F.2d at 324-325 n.13).

Petitioner intimates (Pet. 4 & n.3, 6) that the order bars it from terminating the rights of a defaulting purchaser and would prevent it from reselling a lot under contract to such a purchaser. These exaggerations are simply an effort to avoid the Commission's finding that the forfeiture clause constitutes an unfair practice; "[h]aving lost the battle on the facts, [petitioner] hope[s] to win the war on the type of decree" (*FTC* v. *National Lead Co.*, 352 U.S. at 429). Nothing in the Commission's order prevents petitioner from retaining possession of property in the event of a default, instituting procedures to allow resale of the property, commencing an action to recover its actual damages due to the default as calculated under the applicable state law rule, and retaining the purchaser's payments in an amount equal to such damages.

[12] We do not acquiesce in the view of the Commission's authority adopted in *Heater*, but no question regarding the correctness of that decision is presented here because the Commission carefully drafted the order to comply with the rule set forth in *Heater* (see Pet. App. 137a-139a).

57b, bars the Commission from prohibiting future enforcement of the forfeiture clause. After a Section 5 cease and desist order has become final, the Commission is authorized by Section 19 to commence a civil action against the respondent in order to obtain the relief necessary "to redress injury to consumers * * * resulting from * * * the unfair or deceptive act or practice"; the relief may include rescission or reformation of contracts, payment of damages, and notice to the public of the violation. The statute specifically provides that "[n]othing in this section shall be construed to affect any authority of the Commission under any other provision of law" (15 U.S.C. 57b(e)), and Congress expressly stated that it did not intend "to modify or limit any existing power the Commission may have to itself issue orders designed to remedying [*sic*] violations of the law" (S. Conf. Rep. 93-1408, 93d Cong., 2d Sess. 42 (1974)). Accordingly, this express grant of authority to reform or rescind illegal contracts provides no basis for a limiting interpretation of the Commission's authority under Section 5. *Warner-Lambert Co.* v. *FTC*, 562 F.2d 749, 757-758 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978); cf. *FTC* v. *H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982).[13]

2. Petitioner also claims (Pet. 9-12) that the Commission exceeded its authority by directing petitioner to inform past purchasers of their legal rights. This provision of the remedial order obviously is rea-

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[13] Petitioner's reliance upon Section 19 is misplaced for the additional reason that Section 19 only relates to retroactive relief for *past* wrongdoing. Here, by contrast, the portion of the remedial order challenged by petitioner prohibits petitioner from enforcing the forfeiture clause in the *future*. Section 19 is thus completely irrelevant in this context.

sonably related to petitioner's illegal conduct. Petitioner's customers must decide whether to continue to make payments in order to gain title to their property, whether to seek private legal advice, and whether to continue to pay taxes and other government fees in order to retain their possibly valueless land. The notice required by the Commission simply informs purchasers of the facts concerning their transactions and apprises them of possible legal options, allowing them to proceed in the future on the basis of the true circumstances, rather than permitting them to continue to rely upon petitioner's deceptions. The notice requirement thus serves "to prevent further injury from [petitioner's] deception" (Pet. App. 139a). Such affirmative disclosures consistently have been held to be within the Commission's authority. *Warner-Lambert Co.* v. *FTC*, 562 F.2d at 756; see also *Grolier Inc.* v. *FTC*, 699 F.2d 983, 987-988 (9th Cir.), cert. denied, 464 U.S. 891 (1983).

Petitioner erroneously asserts (Pet. 9-12) that the decision below upholding this notice requirement conflicts with *Congoleum Industries, Inc.* v. *CPSC*, 602 F.2d 220 (9th Cir. 1979), and *Barrett Carpet Mills* v. *CPSC*, 635 F.2d 299 (4th Cir. 1980).[14] The courts in those cases considered a notification requirement that was part of a recall plan, and the decisions rest upon *Heater*'s prohibition against an order requiring restitution (see 602 F.2d at 226, 635 F.2d at 301-302). Here, by contrast, the notice was not part of a refund plan; the Commission ordered petitioner to provide notice in order to remedy the future conse-

[14] Those cases interpreted the remedial scope of Section 5 of the FTC Act because that provision is incorporated by the Flammable Fabrics Act, 15 U.S.C. 1194.

quences of petitioner's deception. If the true facts are not conveyed to the purchasers, the purchasers will continue to act on the basis of petitioner's misrepresentations and therefore will fall victim to additional harm as a result of these misrepresentations. This provision of the order reduces the possibility of future harm, and thus does not conflict with *Heater*. As the court of appeals held (Pet. App. 15a), the notice requirement plainly was permissible here.[15]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[15] Petitioner repeats its argument that this provision of the order is barred by Section 19 of the FTC Act. As we have discussed (see pages 11-12, *supra*), the savings clause in that statute makes clear that it does not restrict the Commission's remedial authority under Section 5.

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